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Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 51

NATIONAL BROADCASTING COMPANY, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

National Broadcasting Company, Inc. (hereinafter referred to as "NBC") petitions for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the District of Columbia on November 21, 1968. The judgment of the Court of Appeals affirmed, 2 to 1, a ruling of the Federal Communications Commission that radio and television stations that broadcast cigarette commercials must provide a significant amount of broadcast time on a regular weekly basis consisting of material presenting the viewpoint that cigarette smoking may be a hazard to the smoker's health.[1]

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[1] The Federal Communications Commission is hereinafter referred to as the "FCC" and the "Commission".

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is printed as Appendix B to the Petitions for Certiorari.[2]

The initial ruling of the FCC, which was set forth in a letter opinion from the Commission to Television Station WCBS-TV is reported at 8 F.C.C.2d 381 (1967), and is printed at pages 14-17 of Appendix A to the Petitions for Certiorari.

The Memorandum Opinion and Order of the FCC entitled "Applicability of The Fairness Doctrine to Cigarette Advertising", which reaffirms its initial ruling, is reported at 9 F.C.C.2d 921 (1967), and is printed at pages 37-105 of Appendix A to the Petitions for Certiorari.

A clarifying ruling of the FCC with respect to its Order and Memorandum Opinion is reported at 10 F.C.C.2d 16 (1967), and is printed at pages 106-08 of Appendix A to the Petitions for Certiorari.

The Commission's letter denying the Tobacco Institute's petition for reconsideration of the clarifying ruling is printed at pages 113-15 of Appendix A to the Petitions for Certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on November 21, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[2] Appendices A, B, and C referred to herein are contained in a separately bound document and constitute appendices to the several Petitions for Certiorari separately filed by the petitioning parties. References to those appendices will be in the form "App. A, p. ——". Since the material in Appendix A was extracted from the Joint Appendix filed in the Court of Appeals, the pagination of that Appendix is not consecutive.

Questions Presented

1. Is the FCC's ruling on cigarette advertising in contravention of the First Amendment to the Constitution?

2. Is the FCC's ruling on cigarette advertising in excess of the Commission's statutory authority under the Communications Act of 1934 as amended?

3. Is the FCC's ruling on cigarette advertising preempted by or in conflict with the Federal Cigarette Labeling and Advertising Act or the Congressional purposes and findings that underlie that statute?

Statutes Involved

Sections 2, 4, 5 and 10 of the Federal Cigarette Labeling and Advertising Act of 1965, 79 Stat. 282 (1965), 15 U.S.C. §§ 1331, 1333, 1334, and 1339; and Sections 307(a) and (d), 309(a), 315(a) and 326 of the Communications Act of 1934, 48 Stat. 1083, 1085, 1088, 1091, as amended, 47 U.S.C. §§ 307(a) and (d), 309(a), 315(a) and 326, are respectively set forth in Appendix C hereto.

The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." (U.S. Const., Amend. I)

Statement of the Case

The proceedings leading to the FCC's ruling on cigarette advertising stemmed from a complaint, dated January 5, 1967, which was filed with the FCC against station WCBS-TV, New York, by Mr. John F. Banzhaf III. The complaint asserted that WCBS-TV had aired numerous commercial advertisements for cigarette manufacturers and

demanded that appropriate action be taken against the station because it had failed to make corresponding free time available to recognized anti-smoking organizations to present contrasting viewpoints. (App. A, pp. 14, 15)

The FCC's Initial Ruling

The FCC, without having before it the text of the advertisements referred to in the complaint,[3] and without affording WCBS-TV, or any other licensee or individual, any opportunity to reply, ruled by letter opinion dated June 2, 1967, that its "fairness doctrine" applied to all cigarette advertising, whatever its content, broadcast by any television or radio station. (App. A, pp. 14-17) The FCC's ruling stressed "that our holding is limited to this product—cigarettes". (App. A, p. 15) It stated:

> "We hold that the fairness doctrine is applicable to such advertisements. . . . The advertisements in question clearly promote the use of a particular cigarette as attractive and enjoyable. . . . We believe that a station which presents such advertisements has the duty of informing its audience of the other side of this controversial issue of public importance—that however enjoyable, such smoking may be a hazard to the smoker's health." (App. A, p. 15)

The FCC therefore concluded that "a station which carries cigarette commercials" must "provide a significant amount of time for the other viewpoint . . . ." (App. A, p. 16) The Commission made clear that this requirement had to be met on a regular *weekly* basis. (App. A, pp. 16, 17)

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[3] The complaint had cited three particular commercials, which it did not set forth in detail but instead described summarily in highly generalized terms.

However, the Commission ruled that "The fairness doctrine does not require 'equal time'. . . ." (App. A, p. 15)

Application of the "Fairness Doctrine" Prior to the FCC's Ruling on Cigarette Advertising

The "fairness doctrine" alluded to in the FCC's June 2, 1967 ruling was previously set out in its *Report in the Matter of Editorializing By Broadcast Licensees,* 13 F.C.C. 1246, 25 R.R. 1901 (1949) (hereinafter referred to as the "Editorializing Report"). As explained there, the "fairness doctrine" had been an adjunct of what the FCC regarded as its licensees' general duty to "determine what percentage of the limited broadcast day should appropriately be devoted to news and discussion or consideration of public issues". (13 F.C.C. at 1247) The Editorializing Report stated:

> ". . . in such presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness . . . .
>
> • • •
>
> ". . . broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities, ..." (13 F.C.C. at 1250-51)

The Editorializing Report also indicated that the manner of application of the "fairness doctrine" by the FCC was of an equally generalized nature—it formed part of the Commission's consideration of a licensee's "overall pattern of broadcast service" at license renewal time (13 F.C.C. at 1255), the test being whether this

> ". . . overall record demonstrates a reasonable effort to provide a balanced presentation of comment and opinion on such issues. The question is necessarily one of the reasonableness of the station's actions, not whether

any absolute standard of fairness has been achieved." (13 F.C.C. at 1255)[4]

Both the substance and the manner of implementation of the FCC's fairness doctrine remained substantially unchanged until July 16, 1963.[5] On that date the Commission issued a Public Notice which reiterated the doctrine in its preexisting general terms but also set forth a mandatory procedure for the allowance of reply time in cases of personal attack and of editorials supporting or opposing political candidates. See the FCC's Public Notices of July 26, 1963, FCC No. 63-734, 25 R.R. 1899 (1963), and July 1, 1964, FCC No. 64-611, 2 R.R.2d 1901 (1964). These mandatory procedures were later adopted as formal Commission rules—which were recently declared unconstitutional by the Court of Appeals for the Seventh Circuit.[6]

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[4] In its later "Fairness Primer", *Applicability of the Fairness Doctrine in the handling of Controversial Issues of Public Importanee*, FCC Public Notice of July 1, 1964, 29 Fed. Reg. 10415, 2 R.R. 2d 1901 (1964), the Commission described the scope of the licensee's discretion as being very broad:

> "[T]he licensee in applying the fairness doctrine, is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all other facets of such programming." (*Id.*, 2 R.R. 2d at 1904)

[5] Reviewing the background of the fairness doctrine and FCC regulation of programming during this period, the majority opinion of the Court of Appeals described it as follows:

> "The licensee has broad discretion in giving specific content to these duties, and on application for renewal of a license it is understood the Commission will focus on his overall performance and good faith rather than on specific errors it may find him to have made. In practice, the Commission rarely denies licenses for breaches of these duties." (App. B, p. 23a)

[6] The applicability of the fairness doctrine to personal attacks and the promulgation of the personal attack rules have resulted in conflicting decisions in the Circuits, which are scheduled to be re-

(continued)

The ruling on cigarette advertising thus constitutes the second recent effort of the Commission to expand the scope and alter the manner of application of its regulation of programming by adopting what is in effect "a prospective, legislative-type rule".[7] As the majority opinion of the Court below recognized, the ruling on cigarette advertising is "to all intents a novel application" of the FCC's fairness doctrine. (App. B, p. 15a) It not only imposes an "unusual limitation on licensee discretion" by requiring intensive, weekly presentation of a specific FCC-sanctioned viewpoint (App. B, p. 24a), but does so, in the words of the Court of Appeals, in a situation where the so-called "controversial issue" (the effect of smoking on health), which is the touchstone of the fairness doctrine, is raised "only by implication". (App. B, p. 16a) Moreover, the programming that actually triggers the obligation to present the particular contrasting viewpoint required by the Commission, rather than involving any discussion or consideration of public issues, instead contains "no information or arguments . . . which might contribute to the public debate". (App. B, p. 35a)

The FCC's Memorandum Opinion and Order

Since implementation of the FCC's ruling on cigarette advertising would have an immediate impact on the entire broadcasting industry, and since it also augured an ap-

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viewed by this Court during the present term. See *Red Lion Broadcasting Co.* v. *FCC*, 381 F.2d 908 (D.C.Cir. 1967), *cert. granted*, 389 U.S. 968 (1967) (upholding the application of the underlying fairness doctrine to specific cases of personal attack) and *Radio Television News Directors Ass'n* v. *United States*, 400 F.2d 1002 (7th Cir. 1968), *cert. granted*, 37 U.S.L.W. 3247 (Jan. 13, 1969) (invalidating the personal attack rules as an abridgement of freedom of the press).

[7] See the concurring opinion of Commissioner Loevinger (App. A, pp. 93-100, at p. 95) with respect to the Memorandum Opinion and Order of the Commission sustaining its original ruling, discussed below at p. 8.

parent change in the Commission's policy regarding the nature and degree of its regulation over program content, NBC and other broadcasters and organizations, as well as the licensee of the individual station which was the subject of the complaint (CBS, licensee of WCBS-TV), petitioned the FCC for reconsideration of the ruling.

In response to these requests, on September 13, 1967 the FCC issued a lengthy Memorandum Opinion and Order entitled "Applicability of the Fairness Doctrine to Cigarette Advertising". (App. A, pp. 37-106)

At the outset of its opinion, the Commission recognized the legal and economic significance of its ruling:

> "We agree that the ruling constitutes a precedent on an important issue which will affect licensees other than WCBS-TV and may necessitate a change in the operations of some." (App. A, p. 40)

The Memorandum Opinion and Order, however, essentially reaffirmed the Commission's earlier ruling:

> "We stress again that what is called for is the allocation of a significant amount of time each week, absent unusual circumstances, to the presentation of the opposing viewpoint in the case of cigarette commercials." (App. A, p. 74)

In a separate opinion which considered the same questions embraced in this petition for certiorari, Commissioner Loevinger expressed "great doubt and reluctance" as to whether the Commission's ruling was, *inter alia*, "substantially consistent with controlling legal rules", but nevertheless concurred because "the result seems to me to be socially and morally right." (App. A, p. 93) He also stated, somewhat inconsistently:

> ". . . [A] burning conviction of good to be achieved or harm to be avoided neither establishes jurisdiction in

a regulatory agency nor provides a sound legal guide to action. The instant proceeding illustrates the point." (App. A, p. 94)

The FCC's Clarification Ruling

In its Memorandum Opinion, the FCC had stated that there was "no inequity" in the fact that its ruling utilized cigarette advertising (which is "precluded by various industry codes and by the Federal Trade Commission from making affirmative health claims") to trigger a required presentation of the view that smoking was harmful to health, because—

> "The Fairness Doctrine affords an avenue for presenting in regular program time the viewpoint of responsible spokesmen for the cigarette advertisers in rebuttal to any health hazard claims made in opposition to cigarette commercials." (App. A, p. 70)

On September 21, 1967, in a clarification letter to Metromedia, Inc., the FCC amended its Memorandum Opinion by eliminating the foregoing requirement and stating that broadcasters who adhered to its ruling were under no obligation to offer rebuttal time to proponents of the view that smoking is not harmful to health. (App. A, pp. 106-08)

The Proceedings in the Court of Appeals

Petitions to review the FCC's ruling on cigarette advertising were filed by various interested parties in the Fourth Circuit and in the District of Columbia Circuit. Jurisdiction in the Courts of Appeals was based on: Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), 48 Stat. 1093; Sections 2 and 8 of the Judicial Review Act of 1950, 28 U.S.C. § 2342, 80 Stat. 622 and 28 U.S.C. § 2348, 80 Stat. 623; Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, 80 Stat. 378; and 28

U.S.C. § 2112, 72 Stat. 941. The proceedings in the Fourth Circuit were subsequently transferred to the District of Columbia Circuit and consolidated with the proceedings there pending.[8]

After the cases were consolidated in the District of Columbia Circuit, the Court of Appeals, in a 2 to 1 decision, affirmed the FCC's ruling. (Judge Miller dissented without opinion from the majority's decision, except from that portion thereof which affirmed the FCC's denial of Mr. Banzhaf's demand that *equal* time be allotted the anti-smoking viewpoint.)

Reasons For Granting the Writ

This case raises fundamental questions as to the statutory basis for, and the constitutionality of, the FCC's power to require the presentation of designated viewpoints on public controversies. These questions, on which this Court has never before ruled, are closely related to issues which the Court has already determined to review in two cases presently pending before it.[9] Moreover, consideration by this Court is particularly necessary and appropriate because the Court of Appeals and the FCC rationalized differently the constitutional and statutory basis for the Commission's action so that the scope and limits of the Commission's power will, unless this Court acts, be confusing and unclear.

Finally, this case presents an important question as to the scope of the preemption imposed by the Federal Ciga-

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[8] Prior to this tranfser, NBC and other broadcasters who had been parties in interest before the FCC for review of its initial ruling had been granted leave to intervene by the Court of Appeals for the Fourth Circuit.

[9] *Red Lion Broadcasting Co.* v. *FCC, supra; Radio Television News Directors Ass'n* v. *United States, supra.*

rette Labeling and Advertising Act. The action taken by the Commission and approved by the Court seriously subverts the objectives of Congress in enacting that statute.

I

The FCC's Ruling Is Inconsistent With the First Amendment.

The Commission's ruling on cigarette advertising is one illustration of its recently proliferating activity in prohibiting, discouraging, or compelling particular programming by broadcast licensees. Prior to this Term, this Court has never found it necessary to define the Commission's role in this area. The Court may provide answers to some of these questions when it rules on *Red Lion Broadcasting Co.* v. *FCC*, 381 F.2d 908 (D.C. Cir. 1967), *cert. granted*, 389 U.S. 968 (1967) and *Radio Television News Directors Ass'n* v. *FCC*, 400 F.2d 1002 (7th Cir. 1968), *cert. granted*, 37 U.S.L.W. 3247 (Jan. 13, 1969), which are presently before it. This case presents another facet of this same congeries of problems. The resolution of these problems is the most challenging, significant, and far-reaching task this Court has ever been asked to undertake with respect to broadcast communication. The Court's rulings will forge a framework for the future development of broadcasting, its relationship with the government, and its place in our rapidly developing and changing society.

We are all familiar with the turmoil in our nation today and the intensity with which conflicting views are held and positions asserted. At such a time, when broadcasters and the Commission are under increasing pressure from a multitude of sources,[10] it is vital that the limits around the

[10] A recent example of this type of pressure occurred following the Democratic National Convention held in Chicago in August, *(continued)*

permissible scope of governmental regulation be clearly drawn. This case calls for the setting of such limits in one of the directions in which the Commission has sought to move.

The Basis of the Ruling of the Court of Appeals

The Commission, in making its cigarette advertising ruling, characterized it as an application of the general "fairness doctrine" and justified it as a means of compelling broadcasters to inform their audience "of the other side of this controversial issue of public importance—that however enjoyable, . . . smoking may be a hazard to the smoker's health." (App. A, p. 39)

The Court of Appeals was obviously troubled by the Constitutional problems posed by the "fairness doctrine".[11]

1968. The FCC wrote to NBC, and to the other networks, demanding that they respond, within 20 days, to its request for comment on the "hundreds" of complaints received by the Commission with respect to the convention coverage. The Commission characterized these complaints as involving the following objections: "Failure to give exposure to the views or statements of city government officials of Chicago, with respect to alleged 'brutality' by the police; and bias in favor of views or opinions in opposition to the policies of the national government with respect to the war in Vietnam." Letter of September 13, 1968 to NBC from William B. Ray, Chief, Complaints and Compliance Division, Broadcast Bureau, FCC. It is evident that the Government's calling a journalist to task for his treatment of issues as explosive as these cuts to the very heart of the free press. It is a danger not to be minimized.

[11] It should be noted that NBC's constitutional argument did not have quite the scattergun effect which the Court below attributed to it. Thus, the Court said that NBC argued that "the public interest standard cannot constitutionally now include any component of program content." (App. B, p. 31a) While NBC believes that any program-oriented regulation raises constitutional issues, its attack here was only directed, first, against the "fairness doctrine", which the Commission's ruling purported to apply, and, second, against the specific ruling here in issue.

It recognized "considerable force" in the argument, which it characterized as "cogent", that no regulation of programming is constitutionally justifiable. It acknowledged that "It may well be that some venerable FCC policies cannot withstand constitutional scrutiny in the light of contemporary understanding of the First Amendment and the modern proliferation of broadcasting outlets." (App. B, p. 32a)

The Court, therefore attempted to narrow the issue. It avoided sustaining the cigarette ruling as an application of the "fairness doctrine", but rather characterized it as being based on a "narrow public health power" (App. B, p. 34a), and as constituting a "public health ruling" (App. B, p. 34a). In effecting this transmutation the Court radically altered the basis of the ruling. Rather than a directive to the broadcast press to present both sides of an issue merely because it is controversial, we now have a directive to disseminate a certain viewpoint because it is respectably endorsed and bears on the public health.

There are at least two difficulties with this shift in the Court's emphasis. First, the Commission did not approach the matter in these terms. The Commission, in the proceedings before it, did not take evidence on the medical questions whether, how, to what extent, or in what circumstances, cigarette smoking is harmful to health. It merely noted the continuing controversy on the subject and that Congress, in view of the existing state of the evidence, was unwilling to decide the question.[12] Thus in its brief in the Court below,[13] the FCC noted that the

[12] The action taken by Congress is described in Point III, *infra*, in connection with the discussion of the preemption and conflict issues raised by the Federal Cigarette Labeling and Advertising Act of 1965.

[13] Hereinafter cited as "Resp. Br.".

House Committee was not "willing to opt for either medical opinion. . . ." (Resp. Br., p. 34) Moreover, rather than finding that smoking is harmful to health, the Commission correctly emphasized that it ". . . is not the proper arbiter of the scientific and medical issue here involved and of course has not sought to resolve that issue." (App. A, p. 86) The *only* finding made by the Commission was that some respectable authorities hold the antismoking view and that there is *controversy* on the question.

Moreover, the Commission's ruling was peculiar as a "public health" measure. The sale of the product was not proscribed or limited. Rather, the remedy imposed was to require broadcasters who carry cigarette advertising (which itself in no way discusses the health issue[14]) to speak out or find others to speak out exclusively on the antismoking side of that admittedly controversial issue.

No one denies that Congress and the agencies which Congress creates can regulate dangerous products. On appropriate findings the distribution of products may be forbidden, and violators subjected to criminal penalties. The justification for such regulation lies in the fact that it can prevent social ills and can be based on standards susceptible of reasonably fair and efficient definition and application. If the test is whether a product produces harm sufficient to warrant prohibiting or limiting its sale, Congress or the agency charged with responsibility can determine what the harm is and whether the need for or utility of the product is sufficient to warrant risking that harm.

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[14] Health claims are forbidden by the cigarette manufacturers' own advertising code and by the FTC Cigarette Advertising Guides. (CCH Trade Reg. Rep. ¶ 7894)

The Commission has operated under no comparable authority and under no comparable set of standards. It has not determined (and has correctly concluded that it is not the proper agency to determine) whether the product is or is not harmful, but only that there is an outcry from a number of sources. It has not determined that the advertisements are in any way false or misleading, but only that, in its view, they imply something about health. Administrative action with enormous impact, not only on the financial fortunes of those who feel the effect of the regulation, but also on the content of what is published by an important segment of the press, cannot properly be rested on criteria so amorphous.

It is evident that the ruling is difficult to explain or justify as a public health ruling and that the "public health" rationalization is merely an effort to obscure the risks to a free press which are inherent in it.

The Danger to the Broadcast Press

While the Court of Appeals dealt at length with the First Amendment issue, it struck only a glancing blow at the real risk to a free broadcast press which NBC emphasized in its briefs. Thus, the Court argued at length that the ruling "does not ban any speech" (App. B, p. 34a), that cigarette advertising, being "commercial speech" only "barely qualifies as constitutionally protected 'speech' " (App. B, p. 34a), that there is no substantial danger that this "commercial speech" will be "significantly chilled" (App. B, p. 36a), and that overall good will be done because additional speech will be compelled. (App. B, pp. 36a-38a)

Finally, and only very briefly, did the Court touch on the real risk which NBC emphasized in its briefs to that Court. *The risk to the free press is not that cigarette*

advertising will be "chilled" or discouraged, but that the Commission, by the selective application of a vague and undefinable standard, will be able to compel the expression of particular viewpoints on particular subjects; and thereby to control, to an impermissible degree, what an important segment of the press says.[15]

Unlike the preexisting fairness doctrine, which is applied in the context of a broadcaster's overall programming, the ruling on cigarette advertising is a "prospective legislative type rule" (App. A, p. 95) requiring regular weekly presentation of a particular responsive viewpoint which the Commission thinks should be expressed. The fact that the requirement is conditioned on the carrying of particular product advertising is not sufficiently limiting to avoid the danger. So long as our broadcasting system is dependent on revenue from the advertising of a multitude of products, the Commission, by selectively invoking its rule, can control to a considerable degree the content of what is broadcast.

Nor does the fact that the specific application of the Commission's policy in the instant case involves an alleged health danger solve the problem. As Commissioner Loevinger recognized, cigarettes are not the only product which has been claimed to be inherently harmful to health,

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[15] As Professor Chafee has said, one of the things most clearly within the concept of censorship is "dictation as to what should go into particular programs." (Z. CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1965), p. 641). And this Court has recognized that compelling expression of certain viewpoints is as much a violation of the First Amendment as is the forbidding of expression. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox . . . or force citizens to confess by word or act their faith therein.").

or which has been the subject of studies by authoritative sources which have concluded or suggested that harm might result from its normal use.[16] Harm or risk or inadequacy of some kind have been attributed, at one time or another, to most products, with varying degrees of rationality and varying degrees of merit in the criticism. For example, respectable authorities have seen risks in pesticides,[17] tranquilizers,[18] saturated fats and cholesterol-laden foods,[19] artificial sweeteners,[20] allegedly unsafe makes or models of American automobiles[21] and many other products. The Commission has already identified fluoridation and "the nutritive qualities of white bread" as controversial issues to which the fairness doctrine

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[16] Commissioner Loevinger said:

"The Commission will be hard pressed to find a rational basis for holding that cigarettes differ from all other hazards to life and health. Contrary to the argument in the Commission opinion (par. 46), the 'normal use' of automobiles does pose a health hazard, polluting the atmosphere to a degree that is dangerous not only to those using the automobiles but, even worse, in some localities to everyone, including infants and invalids." (App. A, p. 96)

[17] R. CARSON, THE SILENT SPRING (1962), *passim*, especially pp. 158-61, 202-04.

[18] See Hammond, *Smoking in Relation to Mortality and Morbidity*, Statistical Research Section, Medical Affairs Department of the American Cancer Society.

[19] F. Moor, *Serum Cholesterol Levels in Adults—United States 1960-62*, published by the National Center for Health Statistics (Series II, No. 22); Grande, *Dietary Factors and Serum Cholesterol*, in PREVENTION OF ISCHEMIC HEART DISEASE, at p. 266 (Raab ed. 1966).

[20] See, *e.g.*, Sayer, *Artificial Sweeteners—Their Impact on the Food Laws*, 21 FOOD, DRUG, COSMETIC LAW JOURNAL 111 (1966), pp. 111-12; XVIII News Report, National Academy of Sciences. No. 3, p. 6 (March 1968).

[21] R. NADER, UNSAFE AT ANY SPEED (1965); KEARNEY, HIGHWAY HOMICIDE (1966).

applies.[22] Moreover, the concept of public health is an elastic one; does it not, for example, include mental and emotional health? It is evident that the Commission's judgment is wholly subjective; there is an enormous range within which reasonable persons can differ as to what viewpoints on what public controversies are essential to present what the Court below characterized as the "crucial . . . accurate picture". (App. B, p. 29a)

Moreover, no reason appears why harm to health henceforth will, or logically should be, accorded a favored status by the FCC as opposed to harm to other "public interests", *e.g.*, the protection of property, national defense, physical comfort and well-being, environmental beauty, or moral or spiritual values. If the Commission is empowered to compel the broadcasting of material responsive to advertising of products claimed to be harmful to health, can it not be argued that the broadcasting of responsive material may also be compelled in connection with the advertising of products claimed to be harmful in any other way?

The danger is compounded by the fact that the Commission's new power is not necessarily limited to compelling broadcasts responsive to "viewpoints" expressed in commercial advertising. It rests on the fairness doctrine, which had its genesis in situations where there had been discussion of a controversial issue, not where there had been solicitation to buy a product. And, while the Court seeks to limit the ruling to situations involving public health, it is not clear that it would limit it only to public

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[22] See *Broadcast of "Living Should Be Fun" Inquiry*, 33 F.C.C. 101, 107 (1962). Commercials involving fluoridated toothpaste might serve to impel responsive presentation of the anti-fluoridation viewpoint under the FCC's new application of its fairness doctrine. This would apparently be true even if the commercials said nothing about fluoridation or its advantages, since the fluoridation issue would presumably be raised "by implication".

health questions raised by advertising. If, in determining what issues are raised by non-advertising program materials, the Commission is to be as subtle in finding positions taken "by implication" as it has been here,[23] then it would be able to regard almost *any* broadcast as expressing a "viewpoint" to which some response might be necessary.[24]

In short, what inevitably emerges from the rationale set forth for the FCC's action is a roving commission in the FCC to sift and weigh what is presented by broadcasters to determine when (by some wholly subjective standard which the Commission has failed to articulate) contrary opinions have a sufficient consensus or are expressed with sufficient stridency to move the Commission to action, and then to compel the broadcasting of material setting forth a governmentally designated responsive viewpoint which the Commission regards as necessary to show which way "the actual odds lie" and to portray the "crucial . . . accurate picture". (App. B, p. 29a)

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[23] The arbitrary nature of the ruling is also manifested by the fact that the Commission, which has here decided that a controversial issue can be raised *by implication*, made precisely the opposite finding in previous cases. Compare the instant determination with the FCC's decision in *Mrs. Madalyn Murray*, 5 R.R.2d 263 (1965). With respect to this inconsistency, the Commission merely asserted that ". . . we do not regard those cases as pertinent here in view of the nature of the controversial issue." (App. A, p. 69, n. 21)

[24] If the Commission regards every cigarette commercial as expressing a view on the health hazards of cigarette smoking, might it not with equal reason regard the smoking of a cigarette by the protagonist in a play as expressing a pro-smoking point of view, or the telecasting of a military parade as expressing a pro-war point of view, or the televising of a view of a smog-choked city as expressing a point of view on the subject of air pollution, or coverage of a political convention or of police reaction to disorder in the streets as presenting some other particular point of view?

The Conflict with the Decision of the Seventh Circuit in the *Radio Television News Directors* Case

The decision of the Court of Appeals is premised, in part, on the drawing of a distinction between the First Amendment protection afforded the printed press, and that afforded the broadcast press. Such a distinction is untenable and was explicitly rejected in the ruling of the Court of Appeals for the Seventh Circuit in *Radio Television News Directors Association* v. *United States, supra.*

This Court has frequently made it clear that radio, motion pictures and television enjoy the constitutional protection afforded the "press" by the First Amendment. See, *e.g., Lovell* v. *City of Griffin,* 303 U.S. 444, 452 (1938): "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." See *United States* v. *Paramount Pictures,* 334 U.S. 131 (1948):

> "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." (334 U.S. at 166)[25]

In rejecting any distinction between the broadcast and printed press as untenable for First Amendment purposes, the Seventh Circuit concluded, in the *Radio Television News Directors* case, *supra* (400 F.2d at 1018-1020), that the modern proliferation of broadcasting outlets had rendered "unpersuasive" what theretofore had been the "most frequently advanced" contention of those who argued that such a distinction should exist—namely, that the broad-

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[25] See also *Rumely* v. *United States,* 90 App.D.C. 382, 197 F.2d 166, 177 (D.C. Cir. 1952), *aff'd,* 345 U.S. 41 (1953); *American Broadcasting Co.* v. *United States,* 110 F.Supp. 374, 389 (S.D.N.Y. 1953), *aff'd,* 347 U.S. 284 (1954).

casting media had a limited supply of outlets and was not "available to all" (*Ibid.*). The Seventh Circuit said:

> "Data comparing the broadcast press and the printed press . . . shows that there are more commercial radio and television stations in this country than there are general circulation daily newspapers. In most major metropolitan areas, there are several times as many radio and television stations as there are newspapers." (400 F.2d at 1018-1019)[26]

The Seventh Circuit also characterized the Commission's arguments based "on the concept of public ownership of space or airwaves" as "logically . . . meaningless" (400 F.2d

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[26] This conclusion is supported by statistical studies which show that there are today a great many more broadcasting stations serving the public both nationally and in most local areas than there are daily newspapers. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, 491, 500 (1961); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 519, 523 (87th ed. 1966); FCC Public Notice-B No. 12,895 released on February 13, 1968; U.S. BUREAU OF THE CENSUS, COUNTY AND CITY YEARBOOK, 1967, Table 3; EDITOR AND PUBLISHER YEARBOOK, 1966; BROADCASTING YEARBOOK, 1966; and TELEVISION FACT BOOK, 1966. Whether the scarcity argument ever had merit is questionable, since *at the time when the First Amendment was adopted,* there were severe technological limitations on the production of newspapers in this country. Printing presses were few in number and were expensive, and the necessary metal type and suitable inks and papers usually had to be imported from Europe at considerable expense. All communications were extremely slow, and there was no regular postal service. It is estimated that in 1776 there were only 41 newspapers in all the colonies. See S.N.D. NORTH, THE HISTORY & PRESENT CONDITION OF THE NEWSPAPER & PERIODICAL PRESS OF THE UNITED STATES (Tenth Census of the United States, Vol. 8, 1884); CHENERY, FREEDOM OF THE PRESS, 142 (1955). With these factors of "scarcity" then present, there was far more occasion for concern that such facilities as were available might be irresponsibly or unfairly used than exists today. Nevertheless, rather than imposing governmental controls to insure that the printed press be well used, the men who wrote our Constitution framed the First Amendment, broadly prohibiting *any* law abridging the freedom of the press.

at 1019).[27] Indeed, even the Court of Appeals in this case recognized that the concept of "public ownership of the airwaves" is not an adequate answer to the First Amendment problem. (App. B, pp. 31a-32a)

The majority below declined to adopt the Seventh Circuit's holding as to the constitutional equality of the broadcast and printed press, and advanced three reasons for rejecting it. It is submitted that none of them is persuasive.

(i) *The "rich variety of outlets" argument*

> "Unlike broadcasting, the written press includes a rich variety of outlets for expression and persuasion . . . which are available to those without technical skills or deep pockets." (App. B, p. 32a)

This argument rests upon the premise that patrons of the broadcast press (unlike newspaper readers) exist in a vacuum, isolated from and unaffected by all other communications media, and therefore must be guaranteed a "fair" presentation of public controversies. The Seventh Circuit expressly rejected this reasoning in the *Radio Television News Directors* case, stating:

> "Although we would agree that radio and television are major vehicles for the dissemination of views on controversial public issues, the Commission has failed to demonstrate that the exposure of all sides of a given issue is not achieved by radio and television

[27] The Seventh Circuit also flatly rejected the FCC's claims that this Court's decision in *National Broadcasting Company, Inc.* v. *United States*, 319 U.S. 190 (1943), supported, or even had any relevance to, the proposition that the broadcast press is not entitled to the same degree of protection as the printed press (400 F.2d at 1018, n. 43).

> in conjunction with other media of communication." (400 F.2d at 1020)[28]

The availability of such inexpensive means of expression as journals, pamphlets, and circular letters is as much an argument for unfettered broadcasting as it is an argument for unfettered newspapers. The fact is that the various media and modes of expression constitute a continuum, not a series of discrete categories of expression each reaching a different audience.[29] That continuum embodies today a diversity of expression unprecedented in the history of our country or any other.

(ii) *The "affirmative act" argument*

> "Written messages are not communicated unless they are read, and reading requires an affirmative act. Broadcast messages, in contrast, are 'in the air'." (App. B, p. 33a)

This "distinction" is also highly dubious. The "affirmative act" necessary for reading finds its counterpart in the requirements of switching on a set, tuning to a particular station, and perhaps (in the case of television) focusing the reception. Even the "habitual" television

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[28] See also Jaffe, *The Fairness Doctrine, Equal Time, Reply to Personal Attacks, and The Local Service Obligation: Implications of Technological Change,* at pp. 2-3 (U.S. Government Printing Office, 1968).

[29] *E.g.,* Blumer, *Suggestions for the Study of Mass Media Effects* (Chapter 10 of BURDICK & BRODBECK, AMERICAN VOTING BEHAVIOR (Free Press 1959)), at pp. 199, 208. There is considerable evidence that, within this continuum, the formation of personal opinions is much more affected by interpersonal private communications with friends and acquaintances than by the mass media. KATZ & LAZARSFELD, PERSONAL INFLUENCE (Free Press 1955), pp. xv (Foreword by Elmo Roper), and see *id.* at p. 3; Berelson, *Communications and Public Opinion,* in SCHRAMM, MASS COMMUNICATIONS (Univ. of Ill. Press, 2d ed., 1960), pp. 531-32.

viewer can avoid any particular television programming, either by turning the dial, or simply by not paying any attention to it.

Certainly, if the unavoidability of the original contact with the message is the determinative factor, the argument would apply with equal force to any strategically placed article in a daily newspaper, and certainly to such common phenomena as billboards and subway posters. Even if, however, there is a degree of difference between the ease of reaching a television viewer and the ease of reaching a newspaper reader, it supports the view that freedom of the broadcast press must be the more carefully guarded. To the extent that a medium's impact is more pervasive and far-reaching, it becomes *more* urgent that governmental influence on the content of what is disseminated be prevented.

(iii) *The "subliminal impact" argument*

> "It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word." (App. B, p. 33a)

Neither the Court below nor the Commission was presented with or considered evidence of any kind as to the supposed "subliminal" impact of broadcasting, or of the relative effectiveness of the spoken over the written word. It may be that the staying power of written material—which continues to be available at all times for rereading by the original reader and others, while the broadcast message once conveyed is gone—counterbalances the "difficult to calculate . . . subliminal impact" of the latter. In any event, the difference, if any, is only one of degree. And,

again, if the subliminal impact of broadcasting is greater, the danger of governmental intrusion is the more serious.

In the final analysis, the only relevant uniqueness of modern broadcasting stems from the phenomenon of electromagnetic interference and the need, upon occasion, to choose among applicants for broadcasting licenses. As both the Court below and the Seventh Circuit recognized, the tremendous technological advances of recent years have greatly reduced the significance of these factors. Even if some government regulation of broadcasting is, and continues to be, necessary, it does not follow that the Commission must be able to regulate the "fairness" of what is broadcast, or dictate that a particular responsive viewpoint must be presented—particularly in the most sensitive area of speech, controversial issues of public importance. *The fact that some regulation is necessary and that some privilege is granted in no way implies that the extension of the privilege may carry with it governmental surveillance or control over the content of what is expressed.* Even the enormously valuable second-class mailing privilege may not be denied to a periodical because it is not "fair" on a controversial issue. *Cf. Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946).

The ruling affirmed by the Court of Appeals is dangerously wrong. It rests on an unsound distinction between the broadcast and the printed press and gives the FCC an undefined and undefinable power to compel expression on controversial questions which is contrary to the traditions of a free press in a democratic society. The ruling is contrary to the decision of the Court of Appeals for the Seventh Circuit; certiorari should be granted and the ruling should be overturned.

II

The Commission's Ruling is in Excess of its Statutory Authority.

The next question presented by the decision below—whether the FCC's ruling on cigarette advertising is in excess of its statutory authority under the Communications Act of 1934—also warrants the attention of this Court.

The Court below has approved a vast expansion of Commission power over the autonomy and discretion of the broadcast press without any express or implied congressional authorization for such an encroachment. The Court below recognized that there is "substantial support from Supreme Court decisions" [30] that there must be a "clear mandate for regulatory activity which brushes against sensitive constitutional areas". (App. B, p. 18a) No such mandate has been given here.

The principal materials relevant in determining whether the power claimed by the Commission has been given it are as follows:

(1) Various provisions of the Communications Act of 1934 vested the FCC with power to grant, revoke or deny broadcast licenses, and applications for the renewal thereof "in the public interest". (47 U.S.C. §§ 307(a) and (d), 309(a))

(2) Section 326 of the Communications Act expressly provides, *inter alia*, that "Nothing in this chapter shall be

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[30] See, *e.g.*, *Ashton* v. *Kentucky*, 384 U.S. 195, 200 (1966); *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963); *Smith* v. *California*, 361 U.S. 147, 151 (1959).

understood or construed to give the Commission the power of censorship. . . " (47 U.S.C. § 326)

(3) In 1959, an amendment was adopted to Section 315(a) of the Act (concerning "equal opportunities" in broadcasts by candidates for public office) which, after expressly exempting certain news programs from the "equal opportunities" requirements of that section, provided that nothing in the exemption:

> ". . . shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." (47 U.S.C. § 315(a))

This amendment was adopted in response to an administrative determination by the FCC which had given an overly broad construction to the preexisting language of Section 315(a). See, *CBS, Inc. (Lar Daly case)*, 18 R.R. 701 (1959).

In *Red Lion Broadcasting Co.* v. *FCC, supra*, the District of Columbia Circuit held that the 1959 amendment to Section 315(a) incorporated the "fairness doctrine" as expressed in the Commission's Editorializing Report (381 F.2d at 930). The majority below, citing the amendment and this Court's decision in *National Broadcasting Company* v. *United States*, 319 U.S. 190 (1943), has now held that there is also statutory authorization for the instant ruling.

Whether the 1959 amendment or the decision in *National Broadcasting Company* v. *United States, supra*, justify such a finding of statutory authorization even as to the pre-

existing fairness doctrine is dubious.[31] It is clear, however, that they do not provide any support for the vast expansion of Commission power represented by the instant ruling. The ruling on cigarette advertising represents a "novel" expansion of FCC power (see pp. 5-7, *supra*) and as such must be assessed under the modern precedents of this Court to see whether it "can stand on its own feet". (App. B, p. 17a)[32] That it cannot do so is manifest.

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[31] The 1959 amendment was not intended to expand or increase the Commission's statutory powers over those which had previously been established by the "public interest" provisions of the Act. See, the *Staff Study for the House Committee on Interstate and Foreign Commerce, "Legislative History of the Fairness Doctrine"*, 90th Cong., 1st Sess. (1958), which concludes that the "more accurate reading of the legislative history" of the 1959 amendment would be that Congress intended not to ratify or codify the fairness doctrine but instead "intended neither approval or disapproval" thereof, *i.e.*, its purpose was simply not to affect or interfere with the preexisting doctrine with respect to political questions one way or the other (p. 29).

Likewise, the Commission's statutory powers were alluded to only in highly generalized terms in the *National Broadcasting Company* case. The case itself merely involved a series of trade regulations, only one of which pertained even indirectly to program content and none of which constituted a regulation of the content of programming.

Moreover, in the earlier case of *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470 (1940), this Court said very explicitly that: "[T]he Act does not essay to regulate the business of the licensee. *The Commission is given no supervisory control of the programs,* of business management or of policy." (309 U.S. at 475) (emphasis supplied.)

[32] As noted by Commissioner Loevinger, the conclusion that Section 315(a) and the Editorializing Report, which refer to and define the "fairness doctrine" only in the context of "commentary" and "discussion", can be *ipso facto* expanded to apply to programming which in no way involves these factors, is "most dubious". (App. A, p. 96) See Appendix A to the FCC's 1964 Fairness Primer, 2 R.R.2d 1901, 1923 (1964) which confirms that the doctrine theretofore encompassed responsive viewpoints pertaining to programs addressed to "the discussion and consideration of contro-

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The opinion of the majority below acknowledged that:

> "... especially with First Amendment issues lurking in the near background, the 'public interest' is too vague a criterion for administrative action unless it is narrowed by definable standards." (App. B, p. 24a)

The majority agreed therefore that the Commission's ruling could not be upheld "merely on the ground that it may reasonably be thought to serve the public interest". (App. B, pp. 24a-25a) However, they asserted that "Whatever else it may mean . . . we think the public interest indisputably includes the public health". (App. B, p. 25a) The majority then concluded that although the "public health" standard was concededly also "murky at the fringes", the ruling on cigarette advertising was sufficiently specific, and addressed to such a real and impressively documented danger, that it was "vulnerable to none of these objections against a broad mandate to the Commission to consider the public health". (App. B, pp. 26a-27a)

Thus, the majority below in effect concluded that congressional authority to adopt the ruling on cigarette advertising could be inferred—even though the Communications Act says nothing about the public health (let alone about the public health and smoking), but alludes only to the "public interest"—because such authorization would, in the majority's view, have been sufficiently clear and reasonable had it been expressly granted.

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versial issues. . . ." Moreover, until recently the Commission made it clear that in applying the fairness doctrine the licensee was required only to make a *reasonable judgment* as to whether a controversial issue was raised and, if so, how it could fairly be presented, *Fairness Primer*, Commission Public Notice 64-611, 2 R.R. 2d 1901, 1904 (1964); Commission Letter to Honorable Oren Harris, FCC Public Notice 63-851, 3 R.R.2d 163, 167 (1963). By the ruling here at issue the Commission itself, *not* the licensee, makes those judgments.

This determination is not only contrary to all of the modern determinations of this Court concerning the standards of specificity required for statutory provisions affecting First Amendment rights; it also conflicts directly with this Court's determination in *Hannegan* v. *Esquire, Inc.*, 327 U.S. 146 (1946) that the Postmaster General's refusal to grant a second class mailing permit on the ground that the published material did not serve the "public welfare" involved a censorial power that had not been delegated by Congress. See also *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Kent* v. *Dulles*, 357 U.S. 116 (1958); *cf.*, *Milwaukee Pub. Co.* v. *Burleson*, 255 U.S. 407, 437 (1921) (dissenting opinion).

III

The FCC's Ruling was Preempted by and in Conflict with the Cigarette Labeling and Advertising Act of 1965.

Finally, certiorari should be granted to review the decision of the Court of Appeals that the Commission's ruling is neither preempted by, nor inconsistent with, the Cigarette Labeling and Advertising Act. The decision is on a matter of great public importance, and is contrary to the intent of Congress as reflected in both the language and legislative history of the Act.

No extended argument is necessary to demonstrate that the nature and extent of the regulation of cigarette advertising which Congress has authorized is an issue worthy of this Court's attention.

Analysis of the Cigarette Labeling Act and its legislative history demonstrates that it was based on three important Congressional determinations:

(1) that, while there are substantial indications that smoking may be harmful to health, there is conflicting evidence on the question and it deserves further study;

(2) that the dissemination of further information to the public is desirable; and

(3) that, in the light of the uncertainty on the question, and in the light of the economic importance of the tobacco industry, and related economic factors, no *regulation of cigarette advertising* other than the congressionally mandated labeling requirement should be imposed pending further study and further action by Congress.

These conclusions are well summarized in Section 2 of the Act which provides for the establishment of a "comprehensive federal program" the principal objectives of which are to inform the public "that cigarette advertising may be hazardous to health by inclusion of a warning to that effect on each package of cigarettes" and to protect "commerce and the national economy" against "diverse, non-uniform, and confusing labeling and advertising regulations with respect to any relationship between smoking and health." (15 U.S.C. § 1331)

Sections 4 and 5 of the Act provide the basic framework of the "comprehensive Federal program". Section 4 sets forth a specific health warning requirement for cigarette packages (15 U.S.C. § 1333) and Section 5(a) renders this labeling requirement exclusive. (15 U.S.C. § 1334(a)) The remaining provisions of Section 5, which is entitled "Preemption", further implement the congressional judgments referred to above.[33] Section 5(b), which pertains directly to advertising, states:

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[33] Section 5(d) calls for further studies and reports on these matters to be submitted to Congress by the Federal Trade Commission and the Secretary of Health, Education and Welfare. (15 U.S.C. § 1334(d))

"No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." (15 U.S.C. § 1334(b))

Section 10 of the Act, which establishes a three year period for consideration of the further studies contemplated under Section 5(d), also confirms Congress' intention to prevent further "regulation of advertising" during this moratorium period:

"The provisions of this chapter which affect the regulation of advertising shall terminate on July 1, 1969, but such termination shall not be construed as limiting, expanding, or otherwise affecting the jurisdiction or authority which the Federal Trade Commission or any other Federal agency had prior to July 27, 1965." (15 U.S.C. § 1339)

This intention to preclude any new or additional regulations pertaining to or affecting cigarette advertising during the moratorium period is also confirmed by the Act's legislative history. For example, Congress specifically rejected a proposal to make Section 5(b), the advertising proviso, applicable only to the FTC and thus to leave the way open for other agencies to regulate cigarette advertising. (See S.Rep. No. 195, 89th Cong., 1st Sess., at 32 (1965)). The Report of the Senate Commerce Committee accompanying the Act clearly articulated the legislative intention to give existing controls a chance to prove their effectiveness:

"Considering the combined impact of voluntary limitations on advertising under the Cigarette Advertising Code, the extensive smoking education campaigns now underway, and the compulsory warning on the package which will be required under the provisions of

this bill, it was the committee's unanimous judgment that no warning in cigarette advertising should be required pending the showing that these vigorous, but less drastic, steps have not adequately alerted the public to the potential hazard from smoking." S.REP. No. 195, 89th Cong., 1st Sess., at 5 (1965).

In connection with this intention to establish a trial period for existing controls, it is also of particular significance that the Senate Commerce Committee (which had jurisdiction over the cigarette legislation and is also the Senate Committee most directly concerned with FCC matters) was operating on the assumption that the opponents of smoking could offer to present their views on radio and television on public service time voluntarily made available by broadcasters but that the stations were not obligated to use their public service time for this purpose:

"[Senator Magnuson] Of course it will be up to the individual licensees to take it or not take it.

"[Surgeon General] That is right, sir. . . ." (*Hearings Before the Senate Committee on Commerce on S. 559 and S. 547*, 89th Cong., 1st Sess. (1965) at 40-41)

Finally, in the course of the floor debate on the Act, Senator Cotton (the ranking minority member of the Committee) plainly stated that it was the intention of an "overwhelming majority" of the Senate Committee on Commerce that "any restriction in the matter of advertising in magazines and elsewhere should be held in abeyance". (111 CONG. REC. 13899)

The Court of Appeals, in its opinion, went far toward recognizing that the Congressional intent was as we have described it above. Thus, the Court noted that Congress was "uncertain of the full extent of the health hazard . . ." (App. B, p. 10a) and went on to say:

"Congress patently did not want cigarette manufacturers harassed by conflicting affirmative requirements with respect to the content of their advertising. In addition, it evidently decided that the case against smoking was not yet so overwhelming as to warrant compelling the cigarette companies to dig their own graves by neutralizing their own advertising messages." (App. B, p. 13a)

Having recognized all of this, it is difficult to understand why the Court did not directly grapple with what we consider to be, at the very least, a difficult issue: Is the FCC's requirement that radio or television advertising be accompanied by anti-smoking material, on a weekly basis, a "regulation of advertising" which Congress intended to foreclose?

The Court avoided facing up to this issue, first, by misstating the petitioners' position, and, second, by begging the question stated above.

The Court describes petitioners' position as being that Congress "meant to forbid any regulation addressed to the smoking-health problem except the Federal Trade Commission's specifically exempted power to police false and misleading advertising." (App. B, pp. 7a-8a) This is a distortion of petitioners' contentions. Properly stated, our contention is that Congress intended to foreclose any regulation, however denominated, *which is, in purpose or effect, a regulation of cigarette advertising.* In its brief in the Court of Appeals the Commission raised the spectre that, if our arguments were accepted, they might invalidate, among other things, state laws forbidding sales of cigarettes to minors and laws requiring smoking education campaigns in the schools. (Resp. Br., pp. 40-41) As

we pointed out below, regulation under such laws is unrelated to *cigarette advertising* and is therefore easily distinguished from the ruling here at issue.

Again, the Court distorts the central issue when it says:

> ". . . we find no sufficiently persuasive evidence that Congress hoped to impede the flow of adequate information for fear that, if the public knew all the facts, too many of them would stop smoking." (App. B, p. 12a)

Of course, Congress did not intend to impede the flow of such information; indeed it took specific steps to encourage the collection and dissemination of such information. It did, however, exhibit its great concern over any kind of regulation which impinged upon the carrying of cigarette advertising or was triggered by the carrying of such advertising.

Thus, the Court's cavalier assumption, that a sharp line can be drawn between "regulation of *broadcasters* designed to inform the public" (App. B, pp. 13a-14a) and the *regulation of advertising* which Congress intended to prevent, was not justified. It is obvious that a regulation of broadcasters may easily also be a regulation of advertising. *Cf. Weber* v. *Anheuser-Busch Co.*, 348 U.S. 468, 479 (1955).

The real question, which the Court did not reach, is whether the FCC's ruling imposes a burden on cigarette advertising of a kind which Congress intended to preclude during the moratorium period. We believe it evident that such a burden is imposed.

The Commission itself recognized the problem. In its brief in the Court below, the Commission conceded that

Section 5(b) of the Act precludes it from requiring that statements of health warnings be included in the advertising and "possibly even adjacent to cigarette commercials." (Resp. Br., p. 41) Obviously, there is no significant difference between requiring a warning in the advertising and requiring a warning immediately at the close of the advertising.

The Commission also conceded in its opinion denying the Petitions for Reconsideration that to require that *equal* time be given to programming with respect to the health issue "would be inconsistent with the Congressional direction in this field provided in the Labeling Act" because, in the Commission's words, "the practical result of any roughly one-to-one correlation would probably be either the elimination or substantial curtailment of broadcast cigarette advertising." (App. A, p. 57)

In making these concessions the Commission acknowledged that Congress intended, in enacting the Cigarette Act, to prevent not only direct regulation of the content of cigarette advertising, but also regulatory activity which might discourage or inhibit cigarette advertising by placing economic or other burdens on it. Having made this concession, it is difficult to understand how the Commission can draw a viable distinction between the ruling which it made here and the regulatory activities which it admits Congress intended to bar.[34]

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[34] The Court below avoided the question whether the requirement of an "adjacent" warning would be permissible. (App. B, p. 13a, n. 29) The Commission never defined what it meant by "adjacent". No criterion is suggested by which the Commission or the Court has been able to determine that the requirement of the broadcasting of a warning within a minute or an hour after the advertisement has been broadcast is invalid or of doubtful validity, but that the requirement of the broadcasting of such a warning during the same day or the same week or the same month is proper.

In fact, application of the controlling precedents of this Court clearly demonstrates that the action which Congress took precluded any new controls affecting cigarette advertising since "the test . . . is whether the matter is in any way regulated by the Federal Act". *Charleston & Western Carolina R.R. Co.* v. *Varnville Furniture Co.*, 237 U.S. 597, 604 (1915). See also *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 240 (1947). Since the Cigarette Act was clearly intended to occupy the field of cigarette advertising regulation during the moratorium period, it preempted the FCC from entering that field.

It is submitted that the Court of Appeals too easily, and wrongly, assumed that the FCC's ruling was not a regulation of advertising.[35] This Court should review that issue.

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[35] The Commission itself had classified its ruling as falling under its "power to regulate advertising" (App. A, p. 43, n. 4) and noted "our ruling applies only to cigarette advertising . . ." (App. A, p. 77) and is a "ruling on cigarette advertising". (App. A, p. 78) The Court of Appeals also, in some parts of its opinion, recognized that the ruling was a "ruling on cigarette advertising". (App. B, p. 26a) Thus, the majority (1) stated that it was the alleged uniqueness of such advertising which purportedly justified the Commission's ruling (App. B, p. 27a, n. 63; App. B, p. 29a), and (2) rejected constitutional arguments based upon the First Amendment on the ground that regulation of advertising (*i.e.*, so-called "commercial" speech) was all that was involved. (App. B, pp. 34a-35a)

CONCLUSION

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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